EMPLOYMENT LAWSCENE ALERT: U.S. SUPREME COURT TO HOLD SPECIAL SESSION ON JANUARY 7, 2022 TO REVIEW FEDERAL VACCINE MANDATES

On Wednesday, the U.S. Supreme Court issued an order (found here) that it would hold a special session to hear arguments on OSHA's vaccine-or-test rule that mandates employers with 100 or more employees require its employees to be fully vaccinated against the COVID-19 virus or be subject to weekly tests. The Court issued its order in response to emergency applications for an administrative stay in response to the U.S. Court of Appeals for the Sixth Circuit's 2-1 decision lifting the stay on OSHA's emergency temporary standard issued by the U.S. Court of Appeals for the Fifth Circuit back on November 6th.

The U.S. Supreme Court's one-page order simply reads:

> Consideration of the applications (21A244 and 21A247) for stay presented to Justice Kavanaugh and by him referred to the Court is deferred pending oral argument. The applications are consolidated, and a total of one hour is allotted for oral argument. The applications are set for oral argument on Friday, January 7, 2022.

It is extremely unusual for the Court to hear arguments on an application for a stay, as it is the Court's customary practice to issue such a ruling based solely on the submission of written briefs.

For now, the U.S. Supreme Court has decided to defer its decision on whether to grant a stay until after the January 7th oral arguments. Although the Court is moving on an expedited basis to hear arguments on whether to grant a stay, with OSHA having previously announced that it would begin enforcement on January 10, but would not issue citations for noncompliance with the standard's testing requirements before February 9 so long as an employer is exercising reasonable good faith efforts to comply, employers hoping for a stay before the holidays will have to diligently continue their efforts to take the necessary steps to implement by January 4th either a mandatory vaccination policy or adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT LIFTS STAY OF OSHA'S VACCINATION MANDATE–OSHA FOLLOWS BY ANNOUNCING ENFORCEMENT POLICY

On Friday, December 17, 2021, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit lifted the stay of OSHA's emergency temporary standard (ETS) mandating COVID-19 vaccinations in the workplace or, alternatively, requiring unvaccinated employees to submit to weekly COVID-19 tests. The stay was originally issued by the U.S. Court of Appeals for the Fifth Circuit on November 5, 2021, when the Fifth Circuit held that OSHA had exceeded its statutory and constitutional authorities when it issued its ETS.

The case was later reassigned to the Sixth Circuit pursuant to a lottery-style drawing in accordance with the federal rules for multi-circuit litigation. Given that 11 of the 16 active judges on the Sixth Circuit are Republican political appointees, it was surmised that the Sixth Circuit would most likely follow the Fifth Circuit's decision in halting OSHA's ETS in its tracks. However, once the case was reassigned, the first battle fought between the parties began with whether the case should be decided by a traditional three-judge panel or whether the case would be heard en banc where the entire panel of 16 active judges would hear the case. In a decision (found here) that appeared to strongly divide the court, the Sixth Circuit denied the petition for an initial hearing en banc reasoning that a three-judge panel of the court had already devoted a significant amount of time to the case and that an initial hearing en banc would only serve to strain the limited resources of the court to have all 16 active judges devote their attention to the case. The Sixth Circuit's decision, however, included a strongly worded 27-page dissenting opinion from the Sixth Circuit's chief judge arguing that Congress had not "clearly" granted the Secretary of Labor authority to impose OSHA's vaccinate-or-test mandate, especially when the authority to regulate public health and safety has traditionally been regulated by the states. The chief judge also argued in his dissenting opinion that the Secretary of Labor had not met the "grave danger" standard for issuance of OSHA's ETS when (1) the key population group at risk from COVID-19–the elderly–no longer works, (2) members of the work-age population at risk–the unvaccinated–have chosen for themselves to accept the risk and any risk is not grave for most individuals in the group, and (3) the remaining group–the vaccinated–does not face a grave risk by the Secretary's own admission, even if they work with unvaccinated individuals. Many legal experts interpreted the chief judge's dissenting opinion not only as a signal that the three-judge panel assigned to the case was ready to issue a decision to lift the Fifth Circuit's stay, but also could serve as a road map for the U.S. Supreme Court to stop OSHA from implementing its vaccinate-or-test rule.

In a 2-1 decision (found here) dissolving the Fifth Circuit's stay, the Sixth Circuit recognized that Congress had granted the Secretary of Labor "broad authority . . . to promulgate different kinds of standards" for health and safety in the workplace, even ones to address a pandemic that contemplates the use of medical exams and vaccinations as tools in its arsenal. The Sixth Circuit hinged its decision on two primary findings. First, the court found that Congress had granted OSHA broad authority under the Commerce Clause to regulate infectious diseases and viruses to protect the interests of interstate commerce (see 29 U.S.C. § 651(a)), and with that authority can issue an emergency standard to protect workers from a "grave danger" presented by "exposure to substances or agents determined to be toxic or physically harmful" in the workplace–which includes infectious agents such as COVID-19 even though the virus is not unique to the workplace. Second, the Sixth Court found that the ETS does not require anyone to be vaccinated, but, rather, allows employers, themselves, to determine the best way to minimize the risk of COVID-19 in the workplace–whether by mandatory vaccinations or requiring unvaccinated workers to wear a mask on the job and test for COVID-19 weekly. Based on these findings, the Sixth Circuit held that OSHA had met its burden in issuing the ETS by adequately establishing that: (1) an "emergency" exists relative to the pandemic; (2) the health effects of COVID-19 present a "grave danger" in the workplace; and (3) the ETS is "necessary to protect employees from" the grave danger.

Appeal Filed with U.S. Supreme Court

Those opposing OSHA's ETS immediately appealed the Sixth Circuit's decision to the U.S. Supreme Court by filing an emergency application (found here) for an administrative stay, or alternatively, writ of certiorari before judgment. It would be anticipated that the U.S. Supreme Court, with its conservative majority, will act relatively quickly on whether to issue the petitioned-for stay or to allow the Sixth Circuit's decision to stand and allow OSHA to move forward to implement its vaccinate-or-test rule.

OSHA Moves Forward

With the Fifth Circuit's stay dissolved by the Sixth Circuit's decision, OSHA did not delay in notifying employers that it intends to proceed with implementation and enforcement of its vaccinate-or-test rule. However, OSHA recognizes that many employers have been waiting for some clear direction from the federal courts as to whether OSHA will be permitted to proceed with implementation of its ETS. As a result, OSHA will delay issuance of any citations for noncompliance with any requirements of the emergency standard before January 10 and will not issue citations for noncompliance with the ETS's testing requirements before February 9, so long as an employer is exercising reasonable, good faith efforts to come into compliance with the standard.

What Employers Need to Know

We would expect that the U.S. Supreme Court, at some point, will be directly involved with the ultimate fate of OSHA's vaccinate-or-test rule. If and until the U.S. Supreme Court becomes involved, employers should start, now, the process of drafting the required policies to comply with OSHA's ETS should it survive the legal challenges confronting it. Employers, by making efforts now to comply by at least having policies in place, should the ETS become effective January 5, 2022, absent further court action, should be able to demonstrate to OSHA that it has taken the reasonable and good-faith efforts to comply with the rule. This will be true even if some employees remain unvaccinated, or the weekly COVID-19 testing protocol for unvaccinated employees is not yet fully operational by January 5. However, all employers with 100 or more employees will have to require and enforce by January 5 that all unvaccinated employees wear face coverings as required by the ETS unless such employees are fully vaccinated.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: SIXTH CIRCUIT SELECTED TO HEAR CHALLENGES TO OSHA'S COVID-19 VACCINATION MANDATE

On Tuesday, November 16, 2021, the U.S. Judicial Panel on Multidistrict Litigation held a lottery-style drawing to select which of the 12 federal circuit court of appeals where petitions for review are currently pending as to which circuit will hear the challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Through that lottery process, the U.S. Court of Appeals for the Sixth Circuit was selected. As a result, the U.S. Judicial Panel on Multidistrict Litigation issued a consolidation order consolidating before the Sixth Circuit all of the petitions for review now pending in the various federal circuit court of appeals.

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. Subsequently, OSHA issued a statement in response to the Fifth Circuit's decision that it would suspend the implementation and enforcement of its emergency temporary standard pending the outcome of the litigation. Relative to the Fifth Circuit's decision, the Sixth Circuit has three options as it can either adopt, modify, or vacate the Fifth Circuit's decision.

The Sixth Circuit, located in Cincinnati, Ohio, oversees the federal district courts covering the states of Kentucky, Michigan, Ohio, and Tennessee. There are 16 total judges on the Sixth Circuit: 11 Republican appointees and 5 Democratic appointees. Six of the Republican appointees were appointed by President Trump and five were appointed by President George W. Bush, while the five Democratic appointments were made by Presidents Clinton and Obama. Although the consolidated petitions for review will be heard by a randomly selected three judge panel, based on the overall makeup of the Sixth Circuit, the chances are relatively high that the mandate will continue to be blocked.

Despite the possible variations of the makeup of the randomly selected judicial panel from the Sixth Circuit, the case could be heard by the Sixth Circuit *en banc* (meaning that the full judicial panel consisting of all judges in regular active service could decide the case). The Sixth Circuit disfavors *en banc* proceedings unless the proceeding involves a question of exceptional importance. To hear a case *en banc*, a majority of the circuit judges who are in regular active service and who are not disqualified may order that the case be heard or reheard by the court *en banc*. It will be interesting to see if the Sixth Circuit decides to permit the consolidated petitions for review to proceed before a randomly selected three-judge panel or if it will decide to initially hear the case *en banc*. For now, the Fifth Circuit's stay remains in place.

As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: FIFTH CIRCUIT ISSUES STRONG REBUKE OF OSHA'S AUTHORITY TO MANDATE VACCINATIONS IN THE WORKPLACE–OSHA SUSPENDS EFFORTS

On Friday, November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a 22-page decision (linked here) continuing its November 6th order that stayed the implementation and enforcement of OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace. In a strong rebuke of the Biden's Administration's desire to vaccinate as many Americans as possible through use of OSHA's emergency temporary standard provision (29 U.S.C. § 655(c)) found in the Occupational Safety and Health Act, the Fifth Circuit found that OSHA exceeded its statutory and constitutional authorities when it issued its emergency temporary standard by finding that "[t]here is no clear expression of congressional intent in § 655(c) to convey OSHA such broad authority, and this court will not infer one…[n]or can the Article II executive breathe new power into

OSHA's authority–no matter how thin patience wears." The Fifth Circuit further found that continuing the stay was in the public interest because it "is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions–even, or perhaps *particularly*, when those decisions frustrate government officials." (Emphasis original).

The Fifth Circuit concluded that the Constitution vests Congress with limited legislative powers; and these powers cannot be usurped by federal regulatory action. The Fifth Circuit stated:

> *The Constitution vests a limited legislative power in Congress. For more than a century, Congress has routinely used this power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down. In the mine run of cases–a transportation department regulating trucking on an interstate highway, or an aviation agency regulating an airplane lavatory–this is generally well and good. But health agencies do not make housing policy, and occupational safety administrations do not make health policy. Cf. Ala. Ass'n of Realtors, 141 S. Ct. 2488-90. In seeking to do so here, OSHA runs afoul of the statute from which it draws its power and, likely, violates the constitutional structure that safeguards our collective liberty.*

The Fifth Circuit ordered that OSHA take no steps to implement or enforce its emergency temporary standard mandating COVID-19 vaccinations in the workplace until further order of the court. In response, OSHA issued the following statement on its website:

> *On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit granted a motion to stay OSHA's COVID-19 Vaccination and Testing Emergency Temporary Standard, published on November 5, 2021 (86 Fed. Reg. 61402) ("ETS"). The court ordered that OSHA "take no steps to implement or enforce" the ETS "until further court order." While OSHA remains confident in its authority to protect workers in emergencies, OSHA has suspended activities related to the implementation and enforcement of the ETS pending future developments in the litigation.*

Despite the Fifth Circuit's decision, the issue is far from being resolved as challenges to OSHA's emergency temporary standard mandating COVID-19 vaccinations in the workplace is now pending in multiple federal circuits. On Tuesday, November 16, 2021, pursuant to the federal rules for multi-circuit litigation, a lottery will be held by the Judicial Panel on Multidistrict Litigation randomly selecting the federal circuit that will host and decide the ultimate fate of OSHA's emergency temporary standard–albeit the U.S. Supreme Court will most likely have the final word in this important debate on the reach of federal regulatory authority. As always, we will keep you updated on this important issue as matters develop.

EMPLOYMENT LAWSCENE ALERT: OSHA ISSUES DETAILS OF VACCINE MANDATE

Today, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") released the Emergency Temporary Standard regarding COVID-19 Vaccination and Testing, which has commonly been referred to as the Vaccine Mandate. It will officially be published on November 5, 2021. Announced by President Biden in September, the Vaccine Mandate requires all employers with more than 100 employees to either require that employees be fully vaccinated or require unvaccinated employees to submit to weekly COVID-19 tests, both of which are subject to reasonable accommodations for disabilities and sincerely held religious beliefs. The Vaccine Mandate does not apply to individual employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors. Although the majority of the Vaccine Mandate officially goes into effect on January 4, 2022, employers need to start preparing immediately in order to be in full compliance by that date, including establishing and implementing the required written policies. Certain provisions, including the fact that employers must offer paid time-off for employees to receive the COVID-19 vaccinations and recover from any side-effects and must require unvaccinated employees to wear masks, go into effect on December 5, 2021.

For employees who opt to utilize the testing requirement, employers must keep records of each test unvaccinated employees take. If an employee is not vaccinated and does not receive a weekly test or if the employee tests positive for COVID-19, the employer must remove that employee from the workplace. A covered employer may require employees to pay for their own COVID-19 testing.

In order to assess whether or not an employer has 100 employees, employers are required to count all full-time and part-time employees at all of their locations, whether or not they work at the company's facility or remotely. Employers are not required to count independent contractors or leased employees, such as those from staffing agencies. Additionally, franchisees may count their employees separately from the franchisor and from other franchisees. Here are some examples provided in the ETS:

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered

even if some of the locations have no more than one or two employees assigned to work there.
- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)
- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

The Centers for Medicare and Medicaid Services issued its own emergency rule requiring healthcare workers at hospitals, nursing homes, and other facilities that participate in Medicare and Medicaid to be fully vaccinated by January 4, 2022, but its rule does not allow for a weekly testing option. In the event of an overlap between the CMS rule and the OSHA rule, the CMS rule will govern. Additionally, in any overlap between the OSHA rule and the requirement that federal contractors be vaccinated, the federal requirement will govern.

The Vaccine Mandate, which has already received significant pushback from certain lawmakers, attorneys general, and business groups, is likely to be challenged in court, and it could be enjoined prior to its effective date. However, employers should not rely on that possibility and should begin preparing now. As always, O'Neil Cannon is here for you and will keep you updated on developments on the Vaccine Mandate as they happen. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.

EMPLOYMENT LAWSCENE ALERT: WHAT DOES PRESIDENT BIDEN'S EXECUTIVE ORDER ON NON-COMPETES MEAN FOR WISCONSIN EMPLOYERS?

On Friday, July 9, 2021, President Biden signed an Executive Order that, among other things, instructed the Federal Trade Commission ("FTC") to ban or limit non-compete agreements and other clauses or agreements that "unfairly limit worker mobility." This is not a federal ban on non-compete agreements and does not change any current law. It is important to note, however, that the FTC and the U.S. Department of Justice Antitrust Division, through civil and criminal enforcement actions, have already been looking at no-poach agreements

between employers and other competitive restrictions through the lens of antitrust and consumer protection laws and have begun to indict those employers who have entered into anti-competitive agreements that adversely affect America's labor market. To comply with President Biden's Executive Order, the FTC will likely go through a notice and comment period and eventually issue regulations governing the enforceability of restrictive covenants. Although a full federal ban on restrictive covenants is unlikely and any FTC rule would be subject to legal challenges, there may be limitations for certain workers (e.g., those in lower wage positions) or those in certain industries (e.g., retail, hospitality). Therefore, employers will need to stay informed on the progress of these regulations.

This is also a good reminder for Wisconsin employers to review their employee restrictive covenants, including non-disclosure, non-solicitation, and non-compete agreements. Regardless of any potential updates to federal law, Wisconsin has its own state statute regulating restrictive covenants – Wis. Stat. § 103.465. Wisconsin's statute imposes certain requirements for a restrictive covenant to be valid, including reasonable time and geographic limitations. Given the new focus on non-competes by the federal government, it is worthwhile for employers to have their restrictive covenants reviewed to evaluate enforceability and ensure that they're being appropriately used to protect those legitimate business interests recognized by law. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding restrictive covenants and related issues.

EMPLOYMENT LAWSCENE ALERT: WHAT DOES THE CDC'S NEW MASK GUIDANCE MEAN FOR EMPLOYERS?

On May 13, 2021, the CDC announced that it had updated its guidance for individuals who have been fully vaccinated against the COVID-19 virus (i.e., individuals who received their final shot more than two weeks ago). The updated guidance states that individuals who have been fully vaccinated against COVID-19 are not required to wear masks or follow social distancing guidelines in most settings. Masks are still required for those who have not reached full vaccination. Masks are also still required for all individuals in certain places, including on public transportation, in transportation hubs, and at high-risk workplaces, such as healthcare, correctional facilities, and homeless shelters. Although this guidance was issued for individuals, the CDC has promised updated guidance for businesses and employers shortly, and some companies have already lifted their mask mandates for customers.

So, while this means that employers may soon be able to relax their mask rules for employees, there are a number of important considerations for employers.

Can an employer ask its employees if they have been vaccinated?

Yes. According to the EEOC, requesting proof of COVID-19 vaccination is not likely to elicit information about a disability, and therefore is not a disability-related inquiry under the ADA, which would otherwise need to be job-related and consistent with business necessity, and does not elicit genetic information protected by the Genetic Information Nondiscrimination Act. Additionally, HIPAA does not apply to employee health information collected or maintained by an employer in its role as an employee's employer. However, medical information regarding employees should be kept confidential and separate from an employee's general personnel file.

Does my company still have to comply with local mask ordinances?

Yes. The CDC guidance specifically says that individuals are still required to wear masks when required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. Therefore, companies located in areas where there are currently mask ordinances in place must continue to follow such local or state laws.

What about OSHA and other safety concerns?

On January 29, 2021, OSHA published guidance that required all individuals to wear masks when in public and around other people and provided that employers should not distinguish between workers who are vaccinated and those who are not. However, OSHA has now stated that it is reviewing the CDC guidance, will update its guidance in the near future, and to "refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers." Therefore, employers should be able to rely on the CDC guidance related to mask mandates and social distancing for fully vaccinated employees. However, employers must remember that, consistent with the obligations under the OSH Act's general duty clause, they will need to continue to provide a safe workplace. Therefore, an employer that abandons all COVID-related safety protocols or permits all employees, regardless of vaccination status, to stop wearing masks may still be at risk of an OSHA complaint.

In summary, employers must continue to comply with local mask ordinances and should monitor OSHA and other guidelines to make sure that they are ensuring the safety of their employees. If an employer decides to allow fully vaccinated individuals to stop wearing masks, it should clearly communicate its policy, including how it will verify vaccination status, to its employees. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may

have, including those regarding COVID-19 and related issues.

EMPLOYMENT LAWSCENE ALERT: AMERICAN RESCUE PLAN EXTENDS TAX CREDITS FOR COVID-RELATED LEAVE

On March 11, 2021, President Biden signed the American Rescue Plan into law. Among a wide variety of other aims, the $1.9 trillion bill extended tax incentives for certain employers that chose to provide their employees with qualifying paid leave related to the COVID-19 pandemic.

In March 2020, the Families First Coronavirus Response Act ("FFCRA") was signed into law. The FFCRA contained two leave components: the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency and Family and Medical Leave Act ("EFMLA"). Under the EPSLA, employers with fewer than 500 employees were required to provide employees with up two weeks of leave sick leave for six COVID-related reasons; and under the EFMLA, employers with fewer than 500 employees were required to provide employees with up to 12 weeks of leave if their children's school or child care facilities were closed due to COVID. Those employers could then offset the expense of such paid leave through tax credits. Mandated leave under the FFCRA ended on December 31, 2020, but in December 2020, the tax credits were extended through March 31, 2021 for employers with fewer than 500 employees that opted to continue to provide qualifying EPSLA and EFMLA leave.

The American Rescue Plan similarly gives employers with fewer than 500 employees the option, but not the obligation, to continue to provide EFMLA and EPSLA to employees through September 30, 2021 and provide employers with a 100% tax credit to offset the cost of such leave. The American Rescue Plan has also expanded the list of qualifying reasons for EPSLA leave to include time off to receive the COVID-19 vaccination and time off to recover from side effects of receiving the vaccination. Employers should be mindful to update their existing FFCRA leave forms to reflect these additional uses for leave. Finally, on April 1, 2021, for employers who opt to provide continued leave pursuant to EPSLA and EFMLA, employees are entitled to a renewed two-week bank of EPSLA leave, and if an employee's bank of FMLA has not otherwise renewed pursuant to the employer's FMLA policy, the 12-week EFMLA leave bank would also be replenished.

Therefore, while the American Rescue Plan does not add any new obligations for employers, it does continue to provide incentives in the event that employers with fewer than 500

employees choose to provide COVID-related paid time off. As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID and related issues.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION'S DEPARTMENT OF LABOR WILL UPEND MANY EMPLOYER-FRIENDLY REGULATIONS

In this, the final installment in our series discussing the Biden Administration's workplace initiatives, we will now discuss some of the potential changes forthcoming from the U.S. Department of Labor that employers should note, including changes to the independent contractor test under the Fair Labor Standards Act, a narrowing of the "joint employer" test under the National Labor Relations Act, an expansion of the Family and Medical Leave Act to provide paid leave through passage of the Family and Medical Insurance Leave Act, and a determined Congressional effort to raise the federal minimum wage to $15 per hour.

Independent Contractor Test Under FLSA

Back in September 2020, the Trump Administration proposed a new rule broadening the independent contractor test to make it easier for companies to classify workers as independent contractors, rather than employees, under the Fair Labor Standards Act (FLSA). Under the FLSA, only employees are entitled to minimum wage and overtime compensation. The new rule proposed by the Trump Administration was set to take effect on March 8, 2021. Now, however, the U.S. Department of Labor has delayed the effective date to May 7, 2021.

The Trump Administration's proposed rule was intended to provide more clarity to the multifactor economic reality test that is presently used in determining independent contractor status under the FLSA. The Trump Administration believed that the economic reality test would benefit from additional clarity because of the way courts have evolved from the text and Supreme Court precedent. The existing economic realities test assesses workers' economic dependence on a potential employer, and many supporters of the proposed independent contractor test argued that the new test was necessary to address concerns that: (1) the core concept of economic dependence remains vague and under-developed; (2) the test lacks guidance about how to balance the multiple factors; and (3) the lines between many of the factors are blurred. The shortcomings of the economic realities

test have become more apparent in the new modern and gig economy.

On March 5, 2021, however, the Biden Administration's Department of Labor sent to the White House of Office Information and Regulatory Affairs a new proposal entitled "Independent Contractor Status Under the Fair Labor Standards Act". It is expected that the Biden Administration will adopt new regulations upending the Trump Administration's employer-friendly independent contractor test and will provide a more employee-friendly interpretation relative to whether an individual is an employee or an independent contractor under the FLSA. The U.S. Department of Labor is nearing completion of a regulatory update to the Trump Administration's proposed independent contractor rules and is simply waiting for White House of Information and Regulatory Affairs' pending regulatory review before releasing the new proposal. Stay tuned for updates as they develop.

Joint Employer Test Under NLRA

In March 2020, the Trump Administration's Department of Labor adopted a final rule narrowing the definition of "joint employer" under the National Labor Relations Act (NLRA) limiting the circumstances under which multiple entities could be deemed the employer of a single worker. The Trump-Era regulation provided that an entity may be considered a joint employer of a separate employer's employees when it has direct control over the employees' essential terms and conditions of employment.

The rule primarily impacts businesses that rely on franchisees or leased workers. The Trump Administration's rule essentially reversed the Obama-Era standard set forth in the National Labor Relations Board's (NLRB) 2015 decision in *Browning-Ferris*. The NLRB's 2015 decision in *Browning-Ferris* lowered the bar for proving an entity was a joint employer by holding that it was no longer necessary that an entity actually exercise authority and control over the terms and conditions of employment or that the control be exercised directly and immediately for a entity to be a joint employer. Fortunately, the NLRB had an opportunity to revisit its *Browning-Ferris* decision in 2020 on remand from the U.S. Court of Appeals for the District of Columbia Circuit. In its 2020 decision, the NLRB reversed course from its 2015 decision, holding that an entity must exercise direct and immediate control over essential terms and conditions of employment of another entity's employees in order to be held a joint employer under the NLRA.

Employers should expect the Biden Administration to attempt to override the new Trump-Era "joint employer" regulation and the NLRB's 2020 decision in *Browning-Ferris* through passage of the controversial Protecting the Right to Organize (PRO) Act of 2021 (H.R. 842), which codifies an expansive "joint employer" standard, which would result in businesses having liability for workplaces that they don't control and workers they don't employ. On March 9, 2021, the U.S. House of Representatives passed 225-206 the PRO Act, again, along party lines. The 2021 version of the PRO Act, among other things, revises the definition of "joint

employer" under the NLRA by requiring the NLRB and courts to consider not only an entity's direct control, but to also consider an entity's indirect control, over an individual's terms and conditions of employment including any reserved authority to control such terms and conditions, which standing alone, can be sufficient to make a finding of a "joint employer" relationship.

The U.S House of Representatives previously passed the PRO Act in 2020, but it stalled out in the U.S. Senate. The recently passed Pro Act will continue to have a challenging time in the U.S. Senate unless the Democrats can get around the filibuster rules which will most likely again stall the bill in the U.S. Senate. Nonetheless, employers should pay close attention to the PRO Act and the Biden Administration's attempt to return to the Obama-Era "joint employer" test where an entity's indirect or unexercised contractually reserved right to control could, alone, warrant finding of a joint-employer relationship.

Family and Medical Insurance Leave Act

The Biden Administration will attempt to expand the Family and Medical Leave Act (FMLA) by supporting job-protected paid leave benefits. Currently, FMLA leave is unpaid unless the employee chooses, or the employer requires, substitution of paid leave (e.g., vacation or PTO).

The Biden Administration will attempt to obtain paid FMLA leave for employees working for private employers through the Family and Medical Insurance Leave (FAMILY) Act (S. 248) which has been recently introduced in the U.S. Senate by Sen. Kristen Gillibrand (D-NY). The FAMILY Act would allow employees to receive up to 12 weeks (60 days) of paid leave in a year for caring for a newborn or newly adopted fostered child, for employee's or employee's family member's serious health condition, or dealing with qualifying exigencies arising from the deployment of a family member in the Armed Services.

However, unlike the FMLA, the FAMILY Act would apply to all employers across the country regardless of their size. That is, eligibility for FAMILY Act benefits would not be tied to FMLA employer coverage and would be available to every individual who has the earnings and work history necessary to qualify for Social Security Disability Insurance. The benefits under the FAMILY Act would be paid through a national family and medical leave insurance fund which would be funded through a payroll tax contribution of 0.20%.

Increase in Federal Minimum Wage to $15

In this series, we previously addressed the Democrats' efforts to increase the federal minimum wage to $15 per hour through a provision in the American Rescue Plan Act of 2021 (i.e., the $1.9 Trillion coronavirus-relief package). Since the posting of our article, the U.S. Senate parliamentarian dealt a deadly blow to the Democrats' efforts to increase the federal

minimum wage when she ruled that the bill's proposal did not meet the U.S. Senate's guidelines for reconciliation, and, therefore, the proposal could not be included in the coronavirus-relief package which was passed by both chambers of Congress this week and signed into law by President Biden on March 11, 2021.

Congressional Democrats, however, did not give up without a fight when they attempted to circumvent the U.S. Senate's reconciliation guidelines and the U.S. Senate's parliamentarian ruling by proposing tax penalties for employers with $2.5 billion or more in gross revenue who do not pay their employees at least $15 an hour instead of having a provision in the bill that directly raised the federal minimum wage. Supporters of addressing a federal minimum wage increase through amendment of the tax code finally relented when the complexity of such a maneuver would delay quick passage of the relief bill which the Democrats wanted completed by March 14, 2021.

The Democrats big push to include a federal minimum wage increase in the corona-virus relief package was an attempt to avoid the U.S. Senate's filibuster rules that a non-budgetary piece of legislation would be subject to under U.S. Senate rules. The Biden Administration, however, will now have to seek an increase in the federal minimum wage through a legislative bill and may have a difficult time getting the bill through the U.S. Senate given the U.S. Senate's current cloture rule to end a filibuster—which requires 60 votes to cut off debate on most matters. We will keep you posted on the Biden Administration's efforts to raise the federal minimum wage.

As always, O'Neil Cannon is here for you to protect your interests. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding any of the new workplace policies or proposed legislation that will be ushered in during the Biden Administration.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION SUPPORTS NEW LAWS PROTECTING EMPLOYEES FROM DISCRIMINATION

In this, the latest installment in our series discussing the Biden Administration's workplace initiatives, we will now consider the potential impact on employment discrimination laws. At the moment, there are two main legislative actions underway in Congress, and President Biden has lent his support to both these initiatives, as well as other proposals that would

affect employment discrimination laws.

Equality Act

In February 2020, the House of Representatives passed the Equality Act, which was originally passed in 2019 but never received a vote in the Senate. The Equality Act would write protections for LGBTQ individuals into Title VII and other federal civil rights statutes and would explicitly prohibit discrimination based on sexual orientation and gender identity. The U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision held that Title VII protects employees against discrimination due to sexual orientation and gender identity, but the Equality Act would codify that decision for employment purposes and also expand the protections to housing, public accommodations, and other contexts. During debate on the bill, Republican lawmakers in the House voiced concerns about how the Equality Act will affect religious freedom for religious organizations. The bill that passed the House specifically states that the Religious Freedom Restoration Act, which provides that the government cannot infringe on a person's religious rights unless it has a good reason to do so and does so in the least restrictive way, cannot be used as a defense against a claim of LGBTQ discrimination under the Equality Act.

The Equality Act now heads to the Senate, where it will need 60 votes to overcome the filibuster. To do so, it may require the addition of religious freedom protections. If the Senate passes the Equality Act, President Biden, who has stated that it is necessary to "lock[] in critical safeguards," is likely to sign the bill into law. Whether or not the Equality Act becomes law, given the recency of the *Bostock* decision, the EEOC is likely to prioritize the protection of LGBTQ employees under Title VII.

Pregnant Workers Fairness Act

In February 2020, the House reintroduced the Pregnant Workers Fairness Act ("PWFA"). The PWFA would require private employers with 15 or more employees and public sector employers to make reasonable accommodations for pregnant employees unless such accommodations would impose an undue hardship on the employer. This will codify and expand upon the U.S. Supreme Court's decision in *Young v. UPS*, which held that employers are required to treat pregnant employees no less favorably than they treat non-pregnant workers with similar inabilities to work. Given the *Young* decision, many employers are likely already providing a least some accommodations to pregnant workers. The PWFA, however, would eliminate the comparison to "non-pregnant workers with similar inabilities to work" and simply require reasonable accommodations, absent an undue hardship.

Under the PWFA, employers would also be prohibited from retaliating against pregnant employees for requesting a reasonable accommodation, and a pregnant employee could not be forced to take paid or unpaid leave if another reasonable accommodation is available. The

PWFA has bipartisan support and will likely pass the House when it comes up for a vote. Like other legislation, the PWFA would need 60 votes in the Senate to over come the filibuster. Given the PWFA's broad bipartisan support, it is likely that it will get a vote in the Senate, pass, and be signed into law by President Biden.

Other Potential Changes

Currently, in order to prevail on a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), an employee must show that age was the "but-for" reason for the adverse employment action. This is a more stringent standard than the "motivating factor" or "mixed motive" standards, which are required to prove other types of employment discrimination, including under Title VII. President Biden has indicated his support for legislation that would eliminate the "but-for" standard and bring the ADEA in line with other anti-discrimination laws that protect employees.

Finally, during his presidential campaign, President Biden expressed support for the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD Act"). This proposed legislation would expand Title VII to cover all employers, not just those with 15 or more employees; would expand the definition of employee to include independent contractors, volunteers, interns, and trainees; and would require anti-harassment policies and training. The BE HEARD Act was introduced in the House in 2019, but never received a vote. Given the other pending employment discrimination legislation, it may not be reintroduced, but its underpinnings of expanded rights are an important barometer for where employment discrimination legislation and policy through the EEOC is likely headed over the next four years.

As always, O'Neil Cannon is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding employment discrimination.